United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1159

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P/S

To be argued by
STEVEN A. SCHATTEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1159

UNITED STATES OF AMERICA,
Appellee,

—v.—

STANLEY SCHILDINGER, a/k/a STANLEY SNYDER,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Stanley Schildinger, a/k/a Stanley Snyder ("Snyder"), appeals from a judgment of conviction entered on April 23, 1976 in the United States District Court for the Southern District of New York, after a three-week trial before the Honorable Charles M. Metzner, United States District Judge, and a jury.

Indictment 75 Cr. 956, filed October 1, 1975, charged Snyder, Edwin Mendlinger, Stuart Schiffman, Barrett Kobrin and Bernard Grindlinger with conspiracy to violate the federal securities laws and to commit mail fraud (count one); counts two through eleven charged Snyder, Mendlinger, Kobrin and Grindlinger with mail fraud in violation of Title 18, United States Code, Section 1341; count twelve charged Snyder, Mendlinger, Kobrin and Grindlinger with violation of Section 10(b) of the Securi-

ties Exchange Act of 1934, Title 15, United States Code, Sections 78j(b) and 78ff(a), and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5; count thirteen charged Mendlinger with preparation of a false corporate income tax return on behalf of the Mendlinger, Snyder, Inc. brokerage firm for the fiscal year ending August 31, 1971; count fourteen charged Snyder with aiding and assisting in the preparation of the same false corporate income tax return on behalf of Mendlinger, Snyder, Inc.; and counts fifteen through eighteen charged defendant Kobrin with perjury in the grand jury.

At the request of Judge Metzner and in order to simplify the issues for the jury (Tr. 1476-1480; A318, A319),* the Government agreed to withdraw the mail fraud counts (counts two through eleven) from the jury's consideration.

Trial commenced on February 10, 1976. On March 4, 1976, the jury found Snyder guilty of counts one and twelve.**

On April 23, 1976, Judge Metzner sentenced Snyder to a term of four months imprisonment and to a fine of $5,000. Mendlinger received the same sentence, which he is now serving. Kobrin received a fine of $10,000, which was subsequently reduced to $7,500.

Snyder remains free on bail pending appeal.

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* Defendant's Appendix is referred to herein as "A". Pages of the transcript of the trial are referred to as "Tr." Government's Exhibits are referred to as "GX".

** Mendlinger was convicted on counts one, twelve and thirteen. Kobrin was convicted on count twelve and acquitted on the remaining counts submitted. Neither has taken an appeal. Schiffman pleaded guilty to the conspiracy count, and testified at trial. Grindlinger was acquitted. At the conclusion of the evidence, Judge Metzner dismissed count fourteen against Snyder.

Statement of Facts

The Government's Case

The Government's evidence, presented through the testimony of more than thirty witnesses and over a hundred documentary exhibits, established that from in or about December, 1970 until the end of May 1971, Snyder, Mendlinger, Schiffman, Perry Scheer, and various accomplices devised and carried out a massive scheme to manipulate the price of the common stock of Belair Financial Company ("Belair"), which was traded in the over-the-counter market, from $1 to $15 per share.* A Los Angeles-based mutual fund, Competitive Associates, Inc., purchased $600,000 of Belair common stock (40,000 shares at $15 per share) and lost its entire investment (Tr. 1361-1362, 1367-1368); an individual invester, Harvey Guerin, sustained losses of over $100,000 by purchasing 12,000 shares of Belair at an artificially inflated price (Tr. 814, 817); and countless other members of the investing public lost many thousands of dollars as a result of the fraudulent scheme, which concealed various manipulative practices and the payment of secret compensation.

In the early summer of 1970, Snyder, through contact with one Roy Nelson, obtained access to a bankrupt corporate shell called Transition Systems, Inc. As a result of discussions during that summer between Gary Aminoff, Walter Paul, Arthur Maslansky and Snyder, the concept of Belair was devised. It was to be a corporation engaged in performing various non-medical services for doctors such as bookkeeping, billing and collections.

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* In the interests of brevity, this statement of facts is limited to the background and evidence regarding Snyder's involvement in the case and discusses the testimony and evidence only insofar as is pertinent to the issues posed on this appeal.

The Transition Systems stockholders owned a total of 205,000 shares of common stock. As part of the arrangements which resulted in the new Belair Financial Corporation, each Transition Systems shareholder received one share of Belair stock for each share of Transition Systems that he had previously held;* in addition, approximately one million shares of Belair were issued to doctors and the organizers of Belair.

In connection with the reorganization of Beliar, in August 1970, Mendlinger, Snyder, Inc. ("M/S"), a New York stock brokerage firm in which Mendlinger and Snyder were the two principals, became the financial consultants and principal market makers to Belair and agreed to remain in this position until September 1972.

In September 1970, Snyder requested and received a list of the former Transition Systems shareholders (GX 110). Snyder, Mendlinger and their secretary thereafter commenced efforts to contact old Transition Systems stockholders in order to buy up their shares. In the fall of 1970, Snyder purchased large blocks of shares in the hands of these shareholders and arranged to free up these shares for trading.

In connection with these efforts to buy Belair stock, Snyder flew out to California in October 1970 to meet Roy Nelson and Paul Joseph, two shareholders of Transition Systems, and purchased approximately 51,600 shares of Belair stock from them. When Snyder sought to bill Belair $1,200 on account of his expenses (GX 20A and 20B; A400-A410), Gary Aminoff, Belair's President, wrote Snyder refusing to pay on the ground that:

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* By reason of the Securities Act of 1933 and the rules and regulations thereunder, these 205,000 shares of common stock, when freed for trading, by opinion of counsel, "no-action" letter or otherwise, constituted the entire public float of Belair that was available for trading in the public market.

> "the principal purpose of your trip, in any event, was to negotiate the purchase of stock from Nelson and Joseph which does not directly benefit Belair." (GX 20C; A412, A413).

Irritated by this response, Snyder wrote to Aminoff on November 6, 1970, stating in part (GX 20D; A414-A416):

> "If all the meetings and discussions we have had regarding the necessity for the success of the company as a trading vehicle to negotiate the purchase of Nelson's and Joseph's stock, as well as working out all the aspects thereof, are not clearly understood as to the direct benefits to Belair Financial more than to Mendlinger, Snyder, I indeed feel sorry for the future of Belair Financial as a public company."

In a footnote to this letter, Snyder revealed his future plans:

> "*There are no magic formulas or so-called dumb luck that separates a very successful priced stock from a very depressed stock that can never get out of its own way. It is a well planned program and a lot of hard work.* The program that has been planned would entail a lot of work and trips to California with various brokerage firms, fund managers, etc. and a lot of entertaining thereof. *The ultimate success and the price of a stock far exceeds one hundred times the cost involved.*" (A416; emphasis supplied).

As part of Snyder's efforts to restrict the available supply of shares of Belair common stock that were part of the float, in January 1971, Snyder wrote to Belair's outside counsel, Clark Van der Velde, requesting that he block (*i.e.*, not free for trading) over 50,000 shares of

Belair common stock in the hands of old Transition Systems stockholders (GX 42, 42A; A427-A428).

In January 1971, Snyder told Aminoff that there were large blocks of stock held by former management of the company and that, where possible, he wished to put stop transfer orders on those blocks of stock so they would not be transferred and sold into the market. Snyder advised Aminoff that if large blocks were sold into the market it would have a depressing effect on the price of Belair stock (Tr. 130).

In early February 1971, Snyder requested and attended a meeting with Stuart Schiffman, President of Kelly, Andrews & Bradley * ("KAB") and Perry Scheer, Secretary-Treasurer, and a registered representative at KAB.

At the meeting, Snyder briefly described the Belair situation, stated that he was the financial consultant for the company and that he controlled the "box" ** in the Belair stock which would be available to assist them in controlling the price of Belair. (Tr. 386-387).

About a week later, Schiffman and Scheer went to Snyder's house for dinner. At the meeting, Snyder stated that if Schiffman and Scheer were able to move up the price of Belair, that he would divide the profits with them "50-50." (Tr. 390). At the meeting, Snyder also

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* The activities of Kelly, Andrews & Bradley, a now defunct New York stock brokerage firm, have been before this Court previously. *United States* v. *Marando*, 504 F.2d 126 (2d Cir.), *cert. denied sub nom. Berardelli* v. *United States*, 419 U.S. 1000 (1974); *United States* v. *Cioffi*, 493 F.2d 1111 (2d Cir.), *cert denied*, 419 U.S. 917 (1974); *United States* v. *Cohen*, 518 F.2d 727 (2d Cir.), *cert. denied sub nom. Duboff* v. *United States* 423 U.S. 926 (1975).

** Schiffman testified that having the "box" means having control over the float, or the trading stock that is in the hands of the public. (Tr. 388).

suggested that Schiffman travel with him to California to see the company. In the last week of February 1971, Schiffman flew out to California where he met Snyder, who had arrived a few days earlier. (Tr. 391). They toured the Belair premises and met counsel for the company, Mr. Maslansky and Mr. Van der Velde. (Tr. 392).

While in California, Snyder went with Schiffman and Aminoff to the transfer agent for the company. Snyder and Schiffman sat down and went over the stockholders list. Snyder pointed out to Schiffman the shares of stock that he had acquired and which he held as part of the "box," as well as the various other shares of stock that he had been negotiating to buy at cheap prices. (Tr. 393).* Snyder also showed Schiffman other stock which he had negotiated to purchase that had previously been insider, nontrading stock, which he was arranging to have freed for trading. (Tr. 393, 141-142).

Later that day at the hotel, Schiffman told Snyder that if KAB got involved they would cause several brokerage firms to go into the over-the-counter pink sheets and make a market in Belair Financial common stock; and that KAB wanted complete control over the price of the Belair stock. (Tr. 394). Schiffman told Snyder that he (Schiffman) would expect cooperation from Snyder; and that, if there were other market makers in Belair, the only ones that Schiffman wanted were those he could control. (Tr. 394).

Snyder told Schiffman that the other two market makers presently trading the Belair stock, Icahn & Co. and J. D. Winer & Co. (both New York stock brokerage firms), were firms with whom he was very friendly and that they were trading the stock under Snyder's direc-

* Most of M/S's shares had been acquired at prices ranging between $0.75 and $2.00 per share.

tion. (Tr. 394). Snyder further informed Schiffman that his partner, defendant Edwin Mendlinger, took care of the trading. Snyder told Schiffman that any time he bought or sold stock, Schiffman was to call Mendlinger and Mendlinger would immediately change his quote. Mendlinger would then contact Icahn and J. D. Winer, and tell them how to quote the stock. (Tr. 395). Schiffman stated that he did not want to be in competition with other market makers. (Tr. 395).

Harvey Printz of Icahn testified corroborating these arrangements. (Tr. 629-641). Mendlinger approached Printz in February 1971, asked him to go into the over-the-counter pink sheets and make a market in Belair. Mendlinger told Printz that he had a large control of the "box" of the stock and a large control of the issue. (Tr. 641). As a market maker, Printz would sell Belair shares and, in principal part, buy his supply from M/S at one-quarter or one-eighth point below his sales price. (Tr. 643-44). At the outset, Mendlinger had told him that Printz wouldn't get hurt by becoming a market maker in Belair. (Tr. 631).

In March 1971, Schiffman arranged to bring in First New York Equities Co., Inc. and Chartered New England Corp., two other stock brokerage firms, as market makers under his control. (Tr. 398). Schiffman also testified that, pursuant to the ararngements with M/S, KAB produced various retail customers' men in other firms who bought stock for their customers.

Among the people whom Schiffman brought into Belair in order to supply buying power was co-defendant Bernard Grindlinger of Suplee-Moseley, Inc., a brokerage firm in York, Pennsylvania. In the middle of March 1971, Grindlinger called Schiffman and told him that he needed $8,000 to pay for losses which one of Grindlinger's customers had sustained in other stocks.

In or about March 21, 1971, Schiffman met Snyder at M/S's offices and asked for $8,000 as part payment for the work that KAB had been doing in connection with Belair stock. Although Schiffman had wanted the money in cash, Snyder wanted to pay by check in the form of a deductible business expense. Snyder suggested that he would issue a check to an accountant, an attorney or a consultant. (Tr. 404-409).

On March 22, 1971, an M/S check (GX 19) in the amount of $8,000 was drawn to the order of Lewis Markowitz, a York, Pennsylvania attorney, and the check was subsequently delivered to Grindlinger pursuant to this arrangement.

Pursuant to the arrangements between M/S and KAB, and the control exercised by KAB, Snyder, Mendlinger and their associates, the price of Belair was raised from $1 per share in February 1971 to $15 per share as of May 3, 1971. (GX 1A; A371-A375).

Schiffman testified that the price rose pursuant to these arrangements. Schiffman also testified that Snyder agreed to permit him to fix the price at which Icahn and J. D. Winer would buy and sell the Belair stock. (Tr. 558-559).

Moreover, Schiffman testified that, pursuant to the agreement with Snyder:

> "We were to control the market in the stock, we were to take the stock, move up the price of the stock, split the profits that were to be made from selling off the stock controlled by Mendlinger and Snyder and to see that the price was controlled in a manner so that we could raise it as we chose to, and that is unusual in that it was in a free-trading market. The market was not a market

> where stocks were bought and sold and the traders in the stock either sold or bought stock, depending upon how they felt about the situation. They were under the direction of Kelly, Andrews and Bradley and their prices fluctuated depending on what Kelly, Andrews and Bradley told them to do. And the other unusual part was that we are getting a profit from the stock that was being sold out of the firm of Mendlinger & Snyder." (Tr. 557-558).

In late April 1971, Schiffman told Snyder that KAB was getting ready to "blow off" or sell a large portion of the stock, perhaps 40,000 shares. (Tr. 418, 575). Schiffman arranged to have Akiyoshi Yamada,* a portfolio manager at Competitive Associates, a California mutual fund, purchase 40,000 shares of Belair at $15 per share for a total purchase price of $600,000. In return, Yamada was to receive a cash payoff of $60,000. The 40,000 shares were shares sold by M/S, via two brokerage firms, to the mutual fund. (Tr. 419-420).

Schiffman advised Snyder of these arrangements and of the need to transmit the $60,000 payoff to Yamada. (Tr. 576). Snyder asked that this be paid out of Schiffman's share of the proceeds, to which Schiffman agreed. (Tr. 576). Upon being apprised of these arrangements, Snyder said "that is fantastic." (Tr. 423).

After Schiffman had a further discussion with Yamada about the transaction, Schiffman told Snyder that KAB would have to sell 10,000 shares to M/S and M/S would sell 40,000 shares at $15 per share to the California

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* Like KAB, Mr. Yamada is not a stranger to this Court. See *United States* v. *Zane*, 495 F.2d 683, 686-87 (2d Cir.), *cert. denied*, 419 U.S. 895 (1974).

mutual fund, Competitive Associates, Inc. (Tr. 423), for a total price of $600,000.*

As of June 3, 1971, only a month after the Belair stock reached its $15 peak, five of the six market makers in Belair, including M/S and KAB, had effectively ceased to quote daily bid and asked prices, thus drying up the market in Belair. (GX 1A; A375-A376). Additionally, M/S's termination of its status as market maker was contrary to its agreement to remain as financial consultant (and therefore market maker) to Belair until September 1972. (GX 31B; A420).

In November 1972, Competitive Associates, Inc. sold its entire 40,000 shares of Belair for *$1.00* altogether, thereby losing its entire investment. (Tr. 1368).

In early May 1971, after the 40,000 share block had been sold to the California mutual fund, Schiffman called Snyder and asked him to complete the compensation arrangements. (Tr. 1084). At a meeting attended by Schiffman, Scheer, Snyder and Mendlinger, Schiffman asked that cash be paid pursuant to the understanding. (Tr. 1085). Mendlinger and Snyder said they could not pay cash but would pay by check. (Tr. 1085). At the meeting, Scheer or Schiffman suggested "the charitable contribution route;" and Snyder and Mendlinger agreed that this was a good way to do it (Tr. 1086), because it would enable them to write checks which they could claim as a deduction on the M/S tax return.

Scheer then met with Nathan Hager and Stanley Peltz, two partners in a trucking business who spent con-

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* The transaction was arranged by having M/S sell two 20,000 share blocks to Chartered New England Corp., who was already in the pink sheets as a market maker in Belair, and to Advest, Inc. These two brokerage firms, in turn, on the same day, April 30, 1971, sold their 40,000 shares to Competitive Associates, Inc.

siderable time at KAB (Tr. 910)* and it was agreed that Hager and Peltz would see if religious organizations could be found that would accept charitable contributions and pay 90% back to KAB in the form of cash. (Tr. 911, 1086-1087).** Pursuant to these discussions, Hager and Peltz received blank receipts from seven religious institutions in Brooklyn. (GX 7A-7G; Tr. 1087).

After they had received the blank receipts from the religious institutions, Hager and Peltz arranged to have them filled out. (Tr. 915). They then went to M/S's office and delivered the receipts. On a total of three occasions, M/S checks totalling $100,000 were made out to the various religious institutions. (GX 6A-6G; A377-A388).

Under the arrangements, the religious institutions kept 10% of the certified checks that they cashed and kicked back the remaining $90,000 in cash. Peltz received $5,000 as a finder's fee for bringing in the institutions. (Tr. 914, 1091).

After completing the transactions with the religious institutions, Hager and Peltz turned over $85,000 to Scheer. Soon thereafter, Scheer gave $60,000 to Yamada's representative in payment of his share of the transaction. (Tr. 1092). Yamada telephoned Scheer the same afternoon and thanked him for the smoothness of the transaction. (Tr. 1092).

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* Hager—who is awaiting sentence on another stock fraud charge—and Peltz were named as co-conspirators but not indicted.

** Scheer told Hager that KAB and M/S were partners in the Belair stock, that there was a substantial amount of profit made on that stock, and that the only way to take the money out was to issue a check to institutions and get cash back. (Tr. 912).

As part of the secret compensation arrangements to pay KAB for having raised the price of Belair, in May 1971, Scheer and Martin Messenger visited the M/S offices. After rejecting a bill for supposed "consulting" services that Messenger had drawn up at KAB, Snyder dictated a consulting agreement (GX 8A; A398) and delivered a $25,000 M/S check to Messenger (GX 8; A396) in Scheer's presence on May 11, 1971 (Tr. 1092-94).

At the time the check was transferred to Messenger, Snyder told him to take the check, get it certified, go to American Express and purchase traveler's checks, and cash the traveler's checks at various banks, no more than $2,000 in each bank. (Tr. 763).

Messenger obtained the necessary cash and turned over more than $24,000 to Scheer at KAB, retaining a $500 commission for himself, with American Express receiving its customary fees. (Tr. 765-766, 1094; GX 8B; A399).

Another $20,000 secret payoff in May 1971 was effected by means of M/S buying for $93,000 and selling for $73,000 on the very same day, 6,700 shares of Belair stock in a transaction with Bert Zaret, a nominee of one of the people whom Schiffman had brought in to promote the Belair stock. (Tr. 519-522; GX 112, 113; A484-A489). Essentially, the Zaret transaction, as it was called, amounted to nothing more than Zaret exchanging his $73,000 check for M/S's check for $93,000, thereby deriving $20,000 for his principal, pursuant to the payoff arrangement; M/S prepared the necessary brokerage confirmation to conceal the true nature of this payoff.

As a result of its dealings in the Belair stock, and pursuant to the scheme to run up the price of Belair

stock from $1 to $15 per share, M/S realized over one-half million dollars in trading profits. (Tr. 1009-1010).*

Defense Case

Snyder testified on his own behalf. He recounted Belair's acquisition of Transition Systems, (Tr. 1542-1561), and his purchase of large blocks of Belair stock from former Transition Systems stockholders. (Tr. 1612-1626).

Snyder testified that in January or February of 1971, he telephoned Scheer of KAB and told Scheer that he wanted to show Scheer a situation in which KAB would be interested in making a market. (Tr. 1641-1642). Snyder testified that he had only met Scheer once or twice before this telephone conversation. (Tr. 1643-1644).

Snyder stated that he attended a meeting with Schiffman and Scheer at KAB at which he asked KAB to make

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* In or about June 1971, at which time Belair had fallen to around $5 per share, Scheer and Hager attended a meeting at the home of co-defendant Kobrin's parents where they attempted to convince Kobrin and other brokers to buy a block of Belair shares still in the hands of M/S. (Approximately 40,000 shares of this block, had been purchased at $2.00 per share by M/S only a few days previously pursuant to a contract with an old Transition Systems stockholder entered into in March 1971.) During the course of the meeting, Scheer told Kobrin that M/S had control of the float and that the supply of Belair stock overhanging the market could be obtained from M/S. (Tr. 1075-1076). This discussion never came to fruition and the block was subsequently sold to Redstone Securities. (Tr. 1012, 1017). Shortly after the Redstone purchase, Kobrin called Neil Pace of Redstone and asked him if Redstone was going to continue to buy Belair and move the stock higher. The Government offered this evidence to show that Kobrin was a member of the conspiracy, a contention the jury rejected by its verdict of acquittal of Kobrin on the conspiracy count.

In any event, Judge Metzner struck (Tr. 2848-49) the testimony of Myron Poloner and Neil Pace of Redstone Securities concerning the Redstone purchase and told the jury to disregard the testimony, except insofar as it was relevant to: (a) the date of the Redstone report, an issue on one of the perjury counts, on which Kobrin was acquitted; and (b) whether Kobrin ever spoke to Pace about Belair.

a market in the Belair stock. (Tr. 1644-1645). Snyder testified that at a second meeting with Schiffman and Scheer it was agreed that Schiffman would go to California with Snyder. (Tr. 1646). Schiffman and Snyder went to California and introduced Schiffman to Van der Velde and Maslansky, Belair's attorneys, and to Belair's officers. (Tr. 1647). Snyder denied the existence of any agreement to rig the price of the Belair stock and stated that Schiffman's testimony as to the agreement to manipulate the price of Belair stock and to kick back profits to KAB, was not true. (Tr. 1649-1650).

Snyder testified that KAB had become a market maker in Belair in March 1971. (Tr. 1658). After Schiffman and Snyder returned from California, between approximately March 5, and March 19, 1971, they spoke only about Belair, how it was doing and how their program of signing doctors was being implemented. (Tr. 1659).

Snyder testified that on March 21 or 22, Schiffman came to his offices and advised him that an arrangement had been made in California that Schiffman was to receive a finder's fee if he was able to locate another market maker for the Belair stock. (Tr. 1660). Chartered New England had gone into the pink sheets as a market maker in Belair in or about March 19, 1971. According to Snyder, Schiffman told him that he thought $8,000 was reasonable compensation for bringing a market maker into the pink sheets for one or two days. (Tr. 1661).

Snyder further testified that, when he disputed the amount Schiffman was entitled to, Schiffman said that he had fulfilled his obligation, that he had severe legal problems and that he needed the $8,000 check to be transmitted to his attorney. (Tr. 1661-1662). Snyder said that he called his attorney, Robert Arum, and related the conversation with Schiffman in order to obtain advice as to the method of paying the attorney. (Tr. 1663).

According to Snyder, Arum said that as long as he owed the debt to KAB, he (Arum) did not see any problem with M/S issuing a check to pay Schiffman's attorney (Tr. 1663-1664).

Snyder testified that prior to March 22, 1971, the only discussion that he had regarding compensation to KAB concerned paying Schiffman an $8,000 finder's fee for bringing in a market maker. (Tr. 1665). Snyder specifically denied promising any kickbacks, any profit sharing or anything of a similar nature. (Tr. 1665-1666).

Snyder denied having any conversations with Schiffman or Scheer or anyone else at KAB as to compensation during the period between March 20 or 21, 1971, when the $8,000 check to Lewis Markowitz (GX 5) was issued, and April 30, 1971. (Tr. 1690).

Snyder testified that on April 30, 1971, which was Easter Sunday, Mendlinger, Snyder, Schiffman and Scheer had a meeting at L'Etoile restaurant at which Schiffman asked Mendlinger and Snyder if they would like to sell a large block of stock, since Schiffman had a buyer that would be interested in buying such a block at prevailing prices (*i.e.*, $15 per share). (Tr. 1694-1695). According to Snyder, Schiffman stated "that if he was successful in finding a buyer he felt he would be entitled to some kind of fee that we would negotiate for moving such a block of stock." Snyder agreed. (Tr. 1694-1695).

Snyder said that he received a telephone call in California from Mendlinger on May 1 or 2, 1971, advising him of the 40,000 share transaction. (Tr. 1695).

On May 7 or 8, 1971, when Snyder returned from California, he received a call from Schiffman and a meeting was arranged. At the meeting, Schiffman informed Snyder that he had been successful in moving the

block of stock and had made a lot of money thereby. (Tr. 1696). Snyder agreed, although he testified that he had no way of knowing whether Schiffman had actually been responsible for the transaction. (Tr. 1697).

Snyder said that Schiffman felt he was entitled to a fee of $125,000. Mendlinger and Snyder then discussed this compensation and they agreed to pay $125,000 for selling the 40,000 shares which had been sold at a total price of about $600,000. (Tr. 1697-98).

Snyder testified that the next day Schiffman came over and Snyder told Mendlinger to write out a $125,000 check. Schiffman said he did not want a check, the money must be in cash. (Tr. 1699). The meeting ended in an impasse.

On or about May 10, 1971, Schiffman visited Snyder and, according to Snyder, said:

> "[KAB had some clients who were members of Brooklyn religious institutions] and he said if I would purchase $100,000 worth of advertising in these journals he would come off as a real hero to his clients and it would do him a lot of good in future situations." (Tr. 1701).

As for the remaining $25,000, Schiffman told Snyder that he wanted M/S to hire Messenger as a consultant for one year and to pay Messenger in advance. Snyder testified that, after he discussed the matter with Mendlinger, he telephoned Arum and told him this story; according to Snyder, Arum said nothing for about 30 seconds and then said, that he saw nothing wrong provided he received invoices from the synogogues before he paid the money and met the consultant. (Tr. 1703-04).

Snyder called Schiffman and told him that if he got the advertising invoices and met the consultant he would pay the money. (Tr. 1705-06).

Snyder testified that he never obtained any advertising or consulting services in connection with these checks. (Tr. 1710). He further stated that at no time in 1971 did he ever learn that the 40,000 share block had been sold to a mutual fund (Tr. 1710); nor did he hear about Yamada or the $60,000 kickback. (Tr. 1710, 1712). Snyder said that he first learned, in the United States Attorney's Office in April 1972, that the 40,000 shares had been sold to the mutual fund. (Tr. 1711).

Snyder further testified that, except for the $8,000 payment to Lewis Markowitz, the $100,000 payments to the religious institutions, and the $25,000 "consulting fee" payment to Messenger, he never made any payments whatsoever in connection with the Belair stock. (Tr. 1723).

Snyder also testified that he never flew to California for the express purpose of buying Roy Nelson's Belair stock. (Tr. 1808). He was then confronted with GX 20C wherein Aminoff wrote to Snyder stating:

> "As I understand it, the principal purpose of your trip in any event was to negotiate the purchase of the stock from Nelson and Joseph, which does not benefit Belair directly." (Tr. 1809).

Snyder testified that Schiffman paid for his own expenses incurred on the trip to California. (Tr. 1843). However, at the time, Snyder submitted a bill to Belair which stated that he was billing Belair for certain entertainment expenses incurred on behalf of Schiffman and which further stated that the major expenditures of Schiffman's trip were borne by M/S. (GX 28; Tr. 1843).

On direct examination, Snyder testified that he had given the $8,000 check, payable to Lewis Markowitz (GX 5), because Schiffman brought Chartered New England into the pink sheets as a market maker in Belair stock

for about two days. (Tr. 1846). However, in the grand jury, Snyder had testified to the effect that the $8,000 Markowitz check had constituted a loan that he had made to Schiffman. (Tr. 1851-1855, 1862).

On cross-examination, Snyder conceded that the consulting agreement that he had prepared in connection with the $25,000 check issued to Martin Messenger was a phony document. (Tr. 1867). However, Snyder denied that he had instructed Messenger to take the $25,000 check, buy traveler's checks and cash the traveler's checks at various banks. (Tr. 1867).

Moreover, contrary to his testimony on direct examination (Tr. 1871-1883), Snyder acknowledged that, in addition to the $8,000 Markowitz check, the $100,000 issued to the religious institutions, and the $25,000 Messenger check for consulting services, he also made an additional $20,000 payoff to Schiffman by way of the Zaret transaction which had been finalized in May 1971. (Tr. 1873-74). Snyder later acknowledged that his direct testimony was untrue (Tr. 1883), and stated that he never spoke to Arum about the Zaret transaction. (Tr. 1886).

Snyder also denied that he had ever discussed with either Scheer or Schiffman that Schiffman had arranged to sell 40,000 shares of Belair to Yamada's mutual fund and to make a $60,000 payoff in connection therewith. (Tr. 1871).*

Co-defendant Edwin Mendlinger testified in his own behalf. On cross-examination, Mendlinger stated that Snyder had told him that Schiffman was very interested in Belair, thought he would be very successful in moving

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* Snyder also called various character witnesses and two stock market experts.

the price up and that if he were successful, that he (Schiffman) expected compensation. (Tr. 2275-2277). Mendlinger further testified that Schiffman asked for the $8,000 Markowitz check because he had arranged to raise the price and had gotten a lot of firms interested. (Tr. 2297).

With respect to the $125,000 paid to Messenger and the religious institutions, Mendlinger said that he had testified in the grand jury that Schiffman wanted $125,000 for what he had done from the very beginning. (Tr. 2303, 2305). This was contrary to Snyder's testimony that the $125,000 was paid to Schiffman merely for arranging for the transfer of the 40,000 share block.

Jerry Perlman, who had been with J. D. Winer & Co., one of the market makers that M/S had brought into the pink sheets for Belair stock, also testified. Perlman denied the existence of any agreement as to price, or any statement by Mendlinger or Snyder that they controlled the float. On cross-examination, Perlman admitted that he went into the pink sheets in Belair as a reciprocal favor for M/S, which had asked similar favors of him in the past. (Tr. 2378-2379). Perlman also testified that on the vast majority of days on which J. D. Winer & Co. appeared in the pink sheets with M/S, the quotes of the two firms did not vary by more than a quarter of a point.

Robert Arum, Snyder's attorney, testified that he could not recall conferring with Snyder in March 1971 with respect to the $8,000 check issued to Lewis Markowitz for "legal fees." (Tr. 2412-13).

Arum further testified that in May 1971, Snyder called him and told him that M/S owed a broker $125,000, but that the broker did not want the fee paid directly to the firm; instead, the broker wanted M/S to buy $100,000

in advertisements from certain charitable institutions. Arum told Snyder to make absolutely certain that they got bills and advertising mats. (Tr. 2415-2416). Arum also testified that Snyder told him that the broker requested that a consultant be hired for $25,000 to render services in the future and that the consultant (*i.e.*, Messenger) had been retained by the broker's firm; Arum told Snyder to meet the consultant and to enter into a contract with him. (Tr. 2416).

On cross-examination, Arum testified that Snyder had indicated to him only the barest outlines of the arrangement to pay the $125,000. (Tr. 2435). Arum testified that Snyder never told him that Schiffman had first asked for cash. (Tr. 2436). Moreover, Snyder did not tell Arum that he had no expectation of any advertising services being rendered to M/S. (Tr. 2438). Snyder did not tell Arum that the $125,000 payment was made to Schiffman for moving a 40,000 share block at $15 per share and that Schiffman had caused the price to rise to $15 by creating an artificial demand, by controlling the supply of the stock and by fixing the price of the stock. (Tr. 2438). Arum also testified that Snyder never told him that the consulting contract was a phony agreement. (Tr. 2445, 2446).*

Government's Rebuttal Case

Snyder had testified on cross-examination that, while he could recognize some of his own handwriting on a list of shareholders of Transition Systems, Inc. (GX 110),**

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* Grindlinger and Kobrin both called various witnesses whose testimony will not be recounted here since it is not pertinent to this appeal.

** This list enabled M/S to contact the various Transition Systems stockholders in an effort to buy up their shares, and, thereby, to obtain control of the float for M/S.

he could not identify the other handwriting on the document. (Tr. 1828-1834). The Government called Robert J. Groden, who had performed accounting services for M/S during the latter part of 1971 and the first half of 1972. (Tr. 2632). Groden was able to identify Snyder's handwriting, Mendlinger's handwriting and their secretary's handwriting on GX 110. (Tr. 2635-2638).*

ARGUMENT

POINT I

The proof overwhelmingly established Snyder's guilt on the conspiracy and securities fraud counts.

Snyder first argues that there was insufficient evidence from which a "reasonable mind might fairly conclude . . . beyond a reasonable doubt" that he was guilty of the conspiracy count and of the securities fraud count. *United States* v. *Taylor*, 464 F.2d 240, 242-45 (2d Cir. 1972).

Snyder's argument on sufficiency of the evidence is largely a repetition of those assertions already made, first to Judge Metzner at the close of evidence, and then to the jury. He thereby ignores the precept that on appeal, evidence must be examined in the light most favorable to the Government, see *United States* v. *Glasser*, 315 U.S. 60, 80 (1943); *United States* v. *McCarthy*, 473 F.2d 300, 302 (2d Cir. 1972). His arguments are little more than an attempt to lure this Court into sitting as a "super jury" to which counsel seeks to address an appellate

* The Government also called Thomas Patrick Doonan, an investigator assigned to the United States Attorney's Office, to rebut certain of the testimony of defendant Kobrin.

summation. This Court has repeatedly declined to assume that role. See *United States* v. *Kahaner*, 317 F.2d 459, 467-68 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963).

The essence of Snyder's sufficiency argument is that the evidence did not establish the requisite wilfulness on his part. The Government's evidence showed that Snyder arranged for acquisition of the corporate shell which ultimately became Belair in August 1970. As financial consultant to Belair, Snyder in September 1970 obtained a list of shareholders of Transition Systems (GX 110), embarked on a plan to acquire large blocks of stock in the hands of old Transition Systems stockholders and ultimately purchased over 100,000 shares. The list of old Transition Systems shareholders which Snyder obtained in September 1970 (GX 110), reveals that Snyder, Mendlinger and their secretary made various efforts to contact such shareholders in order to buy the float in Belair. Moreover, Snyder wrote to Belair's counsel seeking to have the company "block" the freeing of shares that Snyder had no interest in purchasing. (GX 42, 42A; A427-A428). In this connection, Snyder told Aminoff that if large blocks of Belair stock were sold into the market that this would have a depressing effect on its price.

On November 6, 1970, Snyder wrote to Aminoff stating, in part:

> "There are no magic formulas or so-called dumb luck that separates a very successfully priced stock from a very depressed stock that can never get out of its own way. It is a well planned program and a lot of hard work." (GX 20D; A414-A416).

This evidence is strongly indicative of Snyder's efforts to restrict, control and obtain the float in the Belair stock

in order to move up the price of the stock. At his first meeting with Scheer and Schiffman, Snyder stated that "he had been able to put together a large portion of the float and that this box would be available should we be able to promote the sales of the stock in the market." (Tr. 386-87). Scheer testified that Snyder had told them that M/S had accumulated control of the floating shares and that KAB could make a profit of several hundred thousand dollars if it traded Belair. (Tr. 1040).

Schiffman testified that at their second meeting Snyder stated that:

> "(S)hould we [Schiffman and Scheer] be able to move the price of the stock up, produce a large amount of buying and eventually put away the amount of stock that he had gathered, in other words resell it to somebody else or the public at higher price (*sic*), that he would be willing to split the profits from that with us '50-50'." (Tr. 390).

During their trip to California, Snyder brought Schiffman to the transfer agent where he pointed out the shares he held as part of the "box." (Tr. 393). On the same day, Schiffman told Snyder that KAB wanted complete and absolute control over the price of the stock and that the only market makers that KAB wanted in the picture were those he could control. (Tr. 394).

Pursuant to this price fixing agreement, control by M/S over the supply of the stock, and the introduction of buying power by Scheer and Schiffman, all of which Snyder was well aware of (*e.g.*, Tr. 389-390, 393, 395, 557-559), the price of Belair was moved from $1 per share in early February to $15 per share on or about April 30, 1971. In fact, Snyder had a conversation with Aminoff wherein he stated that various brokerage firms that he

had spoken with had been promoting the stock, and that this had created a strong interest in the stock. As a result, there was such a heavy buying and such a short supply of the stock that the price of the stock was driven up. (Tr. 159-160). Furthermore, Snyder had agreed to share M/S's profits with KAB and arranged to cover-up the true nature of the payoffs by disguising them as legal, advertising, and consulting expenditures and, in the case of the Zaret transaction, as a purchase and sale of stock.

Further evidence of wilfullness can be found in Snyder's discussion with Schiffman to arrange for a $60,000 payoff to Akiyoshi Yamada in order to induce him to buy $600,000 worth of Belair stock for his mutual fund. (Tr. 422-423, 574-576). Indeed, Snyder's own expert witness, Stephen Wien, a stockbroker with the Wien Group, testified that the arrangements with Yamada, of which Snyder was well aware, were both abnormal and illegal. (Tr. 2092).

The evidence amply disclosed that Snyder was a prime mover in the conspiracy and the scheme to defraud, directly participated in and had full knowledge of the manipulative activities, was fully aware of the sale of 40,000 shares of Belair stock to the California mutual fund pursuant to the $60,000 secret and illegal kickback to Yamada * and undertook to prepare phony documents and otherwise participate in the making of secret payoffs

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* Title 15, United States Code, Section 80a-17(e), and Title 18, United States Code, Section 2.

to KAB, Schiffman and Scheer in furtherance of the conspiracy and the manipulative scheme.*

At the time of these events, Snyder had been in the brokerage business for nine years and by his own testimony was knowledgeable about the business. (Tr. 1534-1542). This Court's conclusions in *United States* v. *Blitz*, — F.2d —, Dkt. No. 75-1237 (2d Cir. March 25, 1976), pp. 2761, 2789 are equally applicable here:

> "The evidence . . . clearly demonstrated [Snyder's] knowledge of his role in the market manipulation. . . . [Snyder] was no newcomer to the securities business. He knew that the success of this market manipulation, like any scheme to drive up the price of a publicly traded stock, depended upon an intensive, large-scale effort, involving as many brokers and salesmen as could be enlisted. As we pointed out in *United States* v. *Finkelstein*, 526 F.2d 517, 521-22 (2d Cir. 1975), a case involving a similar market manipulation:
>
> > 'The consummation of each particular fraudulent transaction . . . was dependent upon the successful exploitation of the illusion of le-

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* The various "factual" points that Snyder makes in his brief simply ignore the plethora of direct and circumstantial evidence of his guilty knowledge. His arguments also ignore the plain fact that much of his testimony was contradicted both by Government and even defense witnesses. Contrary to law, Snyder's brief assumes his own version of the facts, which the jury simply rejected.

Similarly, Snyder's argument about the supposed lack of a manipulation (Br. at 15) defies the fact of the $1-to-$15 price rise in three months; the fact that if all the market makers agree to fix the prices and bring in buying power this will, as Snyder testified, drive up the price (Tr. 159-160); the testimony of Snyder's own expert that under the facts as the jury found them, M/S, KAB and the other market makers were in control of the float (Tr. 2090-91); and the fact that M/S's half million dollars of trading profits could hardly be attributed to dumb luck.

> gitimate market activity—an illusion to which each transaction contributed its share.'
>
> Under all the circumstances of the instant case, [Snyder] necessarily knew that there were other salesmen involved in this large scale market manipulations—unless he deliberately closed his eyes to that fact."

In sum, the evidence overwhelmingly established Snyder's guilt on the conspiracy and securities fraud charges beyond any doubt whatsoever.

POINT II

Snyder's attacks on the Court's conspiracy charge and its marshalling of evidence in connection therewith are without merit.

> "I would like to state on the record I think it is one of the fairest charges I have ever heard. . . ." (Tr. 2880; A365)
>
> "I think it was a wonderful charge, it was fair to the government and to the defendants and I have no exceptions to the charge whatsoever." (Tr. 2880; A365)
>
> "[I]f this case goes against me, I have no appeal based upon your Honor's charge and I say so on the record." (Tr. 2880; A368).

The above-quoted statements are those of Snyder's counsel who, despite those glowing words delivered immediately after Judge Metzner's instructions, seeks on this appeal to reverse Snyder's conviction on the ground that the charge failed properly to marshal evidence of three supposed conspiracies. Snyder's contentions are frivolous.

In this case, there was no variance between the conspiracy charged in the indictment and that proved at trial. The gist of the Government's conspiracy charge was a conspiracy between M/S, KAB and others to manipulate the price of Belair from $1 to $15, to sell $600,000 of this grossly inflated stock to the California mutual fund in late April 1971 and to dispense the proceeds of this sale in May 1971 by means of a secret compensation scheme.

The overt acts demonstrate that the important transactions underlying this conspiracy occurred between January and May 1971. (A335-A338). The proof and the Government's summation abundantly demonstrated the existence of this central scheme. Judge Metzner's charge in detailing the Government's contentions referred only to this conspiracy (A339-A440); furthermore, in order to make clear that there was merely a single conspiracy involved, Judge Metzner expressly charged the jury that it should not consider evidence relating to the Redstone purchase of Belair stock from M/S, except for certain limited purposes not here germane. (A333-A334).

Despite all this, Snyder claims that another conspiracy was proved, one commenced in June 1971 between Scheer, Schiffman, Kobrin and others, having as its most significant overt act a meeting at Kobrin's parents' house at which Scheer and Kobrin were present. (Br. at 20). The essence of the argument is that Snyder was somehow prejudiced by this proof. As to the meeting at Kobrin's parents' house, Snyder's claim is frivolous. This meeting took place in June, 1971, when Belair stock was selling at $5.00 per share. Kobrin, Scheer, Hagar and others were in attendance, but Snyder was not. This evidence was offered to show Kobrin's participation in the conspiracy with Snyder, Mendlinger, Scheer and Schiffman. However, the jury after careful consideration, chose to acquit Kobrin of the conspiracy charge (although it con-

victed him of the securities fraud charge). It is therefore reasonable to assume that the jury attached little importance to this testimony. It is furthermore, hard to understand how Snyder can claim that the introduction of evidence about a meeting which he did not attend had a spillover effect which fatally prejudiced him, when Kobrin, the key participant in the incident, was acquitted on the conspiracy charge. The Supreme Court has made it clear that "the true inquiry is not whether there has been a variance in proof, but whether there has been a prejudicial variance as to affect the substantial rights of the accused." *Berger* v. *United States*, 295 U.S. 78, 82 (1935). It is clear that this uncredited testimony spanning but a brief meeting and unrelated to Snyder, could not have affected any of his rights.

Furthermore, this case is far removed from the traditional multiple conspiracy cases cited by Snyder. *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), relied on by him, was a complicated narcotics case involving twenty-nine defendants and an additional thirty-one unindicted co-conspirators—sixty individuals in all. Here, the indictment named but five defendants. The courts have recognized that the possibility of prejudice resulting from a variance increases with the number of defendants tried and conspiracies proven. *See United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975) at 156-157; *Blumenthal* v. *United States*, 332 U.S. 539, 559 (1947); *United States* v. *Miley*, 513 F.2d 1191, 1209 (2d Cir. 1975), *cert. denied*, — U.S. — (1976); *United States* v. *Kotteakos*, 328 U.S. 750, 772 (1946). Therefore, the likelihood of a spillover effect in a case involving only a few defendants is small.

Finally, the cases cited by Snyder in support of his contention center upon the unfairness of combining in a single conspiracy criminal acts loosely, if at all, connected. *United States* v. *Sperling*, 506 F.2d 1323 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975); *see also*,

United States v. *Leong*, — F.2d — Dkt. No. 76-1001 (2d Cir. June 23, 1976). The flaw in such cases is the merging of several small conspiracies into one large overall conspiracy. That is not the case here. Even if the incident at Kobrin's parents' house can be classified as a "conspiracy" —and the jury's verdict suggests it cannot—the evidence was in no way prejudicial to Snyder. It is clear in the instant case that the Government charged and proved only one conspiracy: an agreement to manipulate the price of Belair stock and to reap enormous profits thereby. That conspiracy culminated in the April, 1971 "blow-off" and the payment of secret compensation in May 1971.

Additionally, Snyder claims that the judge improperly marshalled the evidence on conspiracy. Rule 30 of the Federal Rules of Criminal Procedure provides:

> "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

As no objection was made to the charge pursuant to Rule 30 by Snyder's counsel, the right to appeal this issue has been waived. *See*, to the same effect as Rule 30, *United States* v. *Carson*, 464 F.2d 424 (2d Cir.), *cert. denied*, 409 U.S. 949 (1972); *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); *United States* v. *Pinto*, 503 F.2d 718 (2d Cir. 1974); *United States* v. *Goldberg*, 527 F.2d 165 (2d Cir. 1975).

In any event, Judge Metzner's charge was entirely proper. Snyder's assertion that "the Court charged that evidence as to all alleged conspiracies, except that concerning Redstone, could be admitted as against all defendants" (Br. 21-22) is totally unsupportable. Judge

Metzner made clear in his charge that the indictment alleged a *single conspiracy* (A334), and described that conspiracy to the jury as the events culminating in the April 1971 blow-off and payment of secret compensation in May 1971. He further instructed the jury that if they did find that the conspiracy alleged in the indictment had been proven, they were required to determine membership on an individual basis by focusing on each defendant *separately.**

The Court concluded its instructions on the existence of a conspiracy as follows:

> "If, after considering each defendant separately, you find that he was not a member of the conspiracy alleged in the indictment, then you should acquit that particular defendant on Count 1.
>
> Thus, it is possible for you to find that none of the defendants or some of the defendants or all of the defendants on trial were members of *the single conspiracy alleged in the indictment.*" (emphasis supplied) (A334).

These instructions were proper, *United States* v. *Calabro*, 449 F.2d 885, 894 (2d Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *United States* v. *Guanti*, 421 F.2d 792, 800 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970); and they clearly protected all of Snyder's rights.

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* "If you satisfy yourselves beyond a reasonable doubt that the conspiracy alleged in the indictment existed, then you must determine, as to each defendant, whether he knowingly and willfully was an active participant in the unlawful plan, with the intention of furthering its objectives." (A330).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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★ U. S. Government Printing Office 1976— 614—350—687

Form 280 A - Affidavit of Service by mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

LAURIE FOSTER, being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 5th day of August, 1976 she served a copy of the within Brief by placing the same in a properly postpaid franked envelope addressed:

William Sherr, Esq.
Bandler & Kass
605 Third Avenue
New York, N. Y. 10016

And deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Laurie Foster
LAURIE FOSTER

Sworn to before me this

5th day of August, 1976

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978